Drive Change

Fair.
Just.
Effective.

Drug driving laws for
medicinal cannabis patients.

The Hon Chris Rath MLC
Parliament House
Macquarie Street Sydney
NSW 2000 Australia

Dear Sir,

I refer to your letter of 24 June 2022, and welcome the opportunity to provide further information as requested.

Anecdotally, I had to sentence literally hundreds of defendants where they were on prescription for THC products, and were apprehended for drug driving. It was tragic. For almost all of them this resulted in a loss of licence. Most professed a need to drive and resolved to go back to their previous use of prescription drugs so as to not be caught again, despite their view (and their GP's opinion) that they were far less medically effective. And the evidence before your Inquiry is unequivocal that alternate prescription medicines pose an equal or greater risk than THC prescriptions.

In terms of judgments, I enclose three which are indicative of the issues raised and the findings I made.

> The first of these is *Carroll*, where I determined that the defence of honest and reasonable mistake of fact applied to this offence, and the prosecution failed to disprove the defence.
>
> The second is *McKenzie*, where the defendant was using cannabis products to treat cancer.
>
> The third is *Spackman*, where the defendant was apprehended by way of passive consumption.

There is one further aspect that I wish to comment on in the light of the evidence given at the Inquiry by Assistant Commissioner of the Traffic and Highway Patrol Command – Brett McFadden at pages 45/46. His evidence was subject to further information being provided, and perhaps it has already been corrected.

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The transcript reads as follows:

> So, if an infringement notice is given in the first instance and just, say, that is resolved in its own way, if the same individual experiences a second detention, there is no option to actually give an infringement notice. That goes to court, but you can't have a conviction recorded to you unless you've got a previous conviction in a court. So, it's an escalating cycle of there's an option for an infringement notice and there's options to take the matter to court on the first occasion. So, really, in a pure instance, it wouldn't be until a third occasion that an individual would be susceptible to a conviction.

The second sentence and fourth sentences are incorrect at law. If a person is dealt with by way of infringement notice for this offence, and then is apprehended again the matter will go to court. In that case, the Magistrate would have the traffic record before them which would list the infringement matter. It is simply incorrect to suggest "you can't have a conviction recorded to you unless you've got a previous conviction in court". In fact, the opposite is true – I cannot imagine a Magistrate would ever deal with a second matter of the same type by way of a non-conviction, whether or not the first matter is dealt with by way of infringement notice. To state that it is only "on a third occasion that an offender would be susceptible to a conviction" is accordingly demonstrably incorrect.

The truth is that whether a first offence is dealt with to finality by way of infringement notice or court attendance it will almost always lead to a suspension or disqualification for months and a fine. A second offence will inevitably lead to a conviction, a criminal record and a longer disqualification and larger fine. The distinction between a traffic record and a criminal record is technical and irrelevant in almost all circumstances.

Please note I am not for a moment suggesting that the Assistant Commissioner was deliberately misleading the Inquiry.

I trust that this material adequately responds to your request. Please do not hesitate to contact me if I can be of further assistance.

Yours sincerely,

David Heilpern
BLegSt(MACQU), LLM(SCU)
Drive Change Co-Founder

W: https://www.drivechangemc.org.au/

LOCAL COURT
New South Wales
Lismore

Jurisdiction:	Criminal
Parties:	Police v Joseph Ross CARRALL
Hearing dates:	21 January 2016, 28 January 2016
Date of Decision:	1 February 2016
Magistrate:	Magistrate David Heilpern
Representation:	Mr Costin-Neilson for the Prosecution on 21 Jan 2016
	Mr Huxtable for the Prosecution on 28 Jan 2018
	Mr Bolt for the Defendant

Reasons for Decision

1 The defendant has been apprehended for the offence of driving with an illicit drug present in his blood (s111 *Road Transport Act 2013*) on two relevant occasions - 26 May 2015 and 23 June 2015. He pleads guilty to the May offence. He pleads not guilty to the June offence on the basis of an honest and reasonable mistake of fact.

2 This judgment is prepared without the benefit of a transcript.

3 There was no expert evidence for either the prosecution or defence.

4 The legislative provision is simple:

> S111 A person must not, while there is present in the person's oral fluid, blood or urine any prescribed illicit drug:
>
> (a) drive a motor vehicle…..

5 The elements of the offence are not in issue – the defendant was driving a motor vehicle on a public street whilst there was present a detectable level of THC in his oral fluid.

6 It is important to note that there need not be any affect proven – the mere presence of a minute or residual presence of THC is sufficient. There is a separate offence of driving under the influence of a drug for which affect must be proven.

Prosecution Case

7 The apprehending officer for the May and the June offence was Senior Constable Chayne Foster. His evidence-in-chief relating to the June offence was by way of statement which relied on the audio recording from the highway patrol vehicle. There was some other conversation not recorded.

8 First the defendant was breath tested for alcohol, and that was negative. In accordance with standing orders, the defendant was asked prior to the test:

> "Have you had any alcohol today"?

9 The defendant was then subjected to a second test, this time for illicit drugs. The officer said:

> "I am now going to subject you to a drug test. Have you taken any illicit substances in the past 48 hours"?

10 The defendant said:

> "I had a smoke over a week ago, Sunday week ago".

11 The first indicative roadside test came back positive to cannabis, and the defendant was arrested and taken to the police station for the purpose of conducting the second test. The defendant said:

> "I thought I would be right, it was over a week ago".

12 The second test also proved positive to cannabis, and so a sample was sent to the Forensic and Analytical Science Service. That sample was tested and a certificate was issued that the defendant's oral sample had cannabis present.

13 In cross-examination it was put to Senior Constable Foster that when he apprehended the defendant on the May occasion, the defendant and he had discussed how long after a smoke before he could drive and not be detected, and the officer had said that he would be required to wait a week.

14 The officer did not unequivocally deny that, but said that he would have been unlikely to say those words, as he would not want to encourage an offence. He did acknowledge a lack of specific memory of that conversation, understandable given the hundreds of tests he must have conducted before and after that occasion.

15 When pressed, he stated that he believed the equipment detected cannabis three to four days after use, but that it depended on a range of factors including the amount consumed, how it was consumed, and the regularity of use leading up to the last occasion.

16 He also stated, from my notes, that “a line had been drawn and that now you could be a smoker and not drive, or a driver and not smoke and that that was the effect of the new laws”.

The Evidence of the Defendant

17 The defendant stated that when he was apprehended by the Senior Constable in May, the officer had said to him "If you had waited a week you would have been fine to drive". He had relied on this information and had last had a smoke of cannabis on the Sunday, almost a week and a half prior to being apprehended the second time. He had been in the same house as another person who had smoked on one occasion in the interim, but that person had been in a closed separate room. The prosecution took this no further once it was apparent that the possibility that this led to further ingestion was remote.

18 Given the length of time, and the police officer’s advice, the defendant stated he was convinced that he was right to drive and would not have THC in his system. He made it clear that in his view he did not consume any cannabis from the potential passive smoking episode.

Burden and onus of proof.

19 There is an evidential burden to raise the defence. This has been achieved by the evidence above. The prosecution then bear the burden of disproving 'honest and reasonable mistake of fact'. The test is stated clearly in the concluding remarks of Goldring J *in Mendolicchiu* at [20]

> I find that, once the appellant raised the defence of an honest and reasonable belief by asserting facts that, if true, would have exonerated him from guilt of the offence, the evidentiary burden of disproving that defence shifted to the prosecution.

Factual Resolution

20 Given the clear and unambiguous evidence of the defendant I am satisfied that the conversation as he recollects it is accurate. He was not shaken in cross-examination. The

officer's evidence was equivocal, and he was not in a position with any certainty to deny what was said.

21 I am also satisfied that the defendant is telling the truth when he says that the last cannabis he smoked was at least nine days prior, and he believed that all the cannabis would have been gone from his system by the date of the alleged offence.

22 The community may be curious as to why the issue of passive smoking was the subject of some focus in cross-examination and examination-in-chief. This court deals with about fifty of these offences each week, and the issue of passive smoking has been canvassed in numerous cases, where people plead guilty even though they are not cannabis users themselves.

23 I am satisfied that the defendant honestly and reasonably believed he did not consume any smoke from the potential passive episode given the location and timing of that occurrence.

Does the defence apply to s111 of the Road Transport Act?

24 It is clear that the defence applies to High Range PCA due to the key and binding case of *DPP v Bone* [2005] NSWSC 1239. The context of that legislation was described as follows at [36]

> "It can easily be accepted that the reason for the legislation in the first place and its increased severity is a reaction to the perceived need in the public interest to deal with the havoc caused when persons who have been drinking also drive"

25 The court accepted that in the case of High Range PCA the offence is one of strict, not absolute liability, and thus the defence of honest and reasonable mistake of fact does apply.

26 This case has been applied in the District Court in *Appeal of Francesco Mendilicchiu* NSWDC 182 (27 August 2008) where the appellant took cough mixture which 'topped him up' to a low range reading. The defendant was acquitted.

27 *Bone* was determined more than a year prior to the legislation creating the current offence under s111. If parliament had wanted to make drug driving an absolute offence it could have by clear unequivocal language in the decade since.

28 In *Proudman v Dayman* [1941] HCA 28 the court found that when dealing with 'a new crime' it is necessary to look at the purpose of the legislation to determine whether the defence would apply.

29 Having carefully read the legislation, the second reading speech when it was introduced, and the above cases there is no reason to differentiate this offence from the drink driving offences.

30 The second reading speeches are interesting for a related purpose - they illustrate the reasoning behind the legislation some ten years ago. The bill which introduced the amendment was the *Road Transport Legislation Amendment (Drug Testing) Bill of 2006*. It was first introduced by Mr Matt Brown, Parliamentary Secretary for Transport in the Legislative Assembly. The aim in general was road safety, and he said on 19 September 2006 (my emphasis):

> People who have *active* drugs present in their system should not be driving on our roads.

31 In the Legislative Council the Bill was introduced by The Hon. Eric Roozendaal, the Minister for Roads who said on 18 October 2006 (my emphasis):

> The bill allows police to randomly test drivers for the presence of three illicit drugs in oral fluid. These are speed, ecstasy and THC, the active ingredient in cannabis. These drugs are illegal, they are the most commonly used drugs in the community and they all *affect the skills and sound judgment* required for safe driving.

32 Whilst not relevant to the issue at hand, but of interest given one of the submissions from Mr Bolt, I note that the Greens also supported the legislation [Hansard 18 October 2006 at 2815] on the basis

> that the screening devices have been shown to only detect THC which is the intoxicating element at very high levels and the window of detection is about one hour. The tests cannot pick up the non-active component, which stays in a

> person's body for a longer period. Therefore, those who smoke cannabis the day before will not test positive according to the advice I have received

33 It is clear that the second reading speech Ministers had in mind that it would be drugs that were 'active' and 'affect the skills' that were the mischief. References to 'no tolerance for any drugs' in the speeches need to be viewed in this context. Whist the police do not have to prove affect, and no bottom limit was set, the target was those who were 'drug driving' just like 'drunk driving'.

34 Clearly, in 2006, the technology was not nearly as advanced as it is now. Certainly it was not the aim of the ministers that if you consume cannabis (at all) you cannot drive (ever), or that those who had been around other smokers could be caught in the net.

35 There is no indication that these offences were to be absolute liability in the wording of the legislation or in the second reading speeches.

36 The prosecution point to some features of the Road Transport Act to suggest that the offence is absolute. The prosecution contend that the wording of the legislation, particularly 111(2) precludes the defence of honest and reasonable mistake of fact. In my view this is not correct, s111(2) relates solely to the issue of multiple drugs in the saliva.

37 The prosecution contends that the very nature of the offence dictates that it ought to be viewed as absolute liability in that it does not use words such as "knowingly" or "wilfully" and the maximum penalty is a fine and disqualification with no prison term.

38 The *Appeal of Francesco Mendilicchiu* is authority for the proposition that the defence applies to Low Range PCA which also does not carry a prison term, and has identical disqualification periods. Low Range PCA provisions also do not mention intent. A mandatory disqualification is a serious and significant punishment. This was recognised by Howie J in the guideline judgment[1] at [116]:

> Licence disqualification is such a significant matter and can have such a devastating effect upon a person's ability to derive income and to function appropriately within the community that it is a matter which, in my view, must be taken into account by a court when determining what the consequences should

[1] Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002) [2004] NSWCCA 303 (8 September 2004)

be, both penal and otherwise, for a particular offence committed by a particular offender.

39 The prosecution contend that the existence of a statutory defence for medicinal purposes for morphine based drugs points to the absolute nature of the s111 offence. As pointed out in *Appeal of Francesco Mendilicchiu* at [12] to [14] the existence of a medical defence and the absence of a specific defence do not mean that the defence is unavailable.

40 The prosecution contend that the importation of the Criminal Code strict liability provisions to the regulations does not apply to the Act. I agree with this proposition. The provisions only apply to the regulations, and thus do not affect the Act.

41 The prosecution did graciously and properly alert me to a very recent unreported spiking case determined in Byron Bay Local Court by Magistrate Dakin, where he dismissed a s111 offence relating to methamphetamine on the basis of an honest and reasonable mistake of fact. That is not binding, but is highly persuasive, and accords with my view.

42 For the reasons above in my view the defence of honest and reasonable mistake of fact is available for the offence charged in the present case. It is a strict liability offence.

Application to the present case

43 I have accepted in this case that the last ingestion of cannabis was at least nine days prior. No-one is seriously contending that the defendant was still in any way affected by the drug. I have found that the informant Senior Constable from the highway patrol asks questions about a 48 hour period, believes the presence generally can be detected for three to four days, and told the defendant that after a week he should be clear to drive.

44 Of course it can never be the law that a person can rely on mistake where they made a miscalculation as to their driving ability based upon a misconceived analysis of their own level of intoxication. Every day in every court in the land defendants say: "I thought I was sober enough to drive". And that is because alcohol and other drugs intoxicate and

dull the judgement. The defence of honest and reasonable mistake is not a drunk (or drug) driver's charter.

45 The comments of Adams J in *DPP v Bone* reinforce this at [36]:

> One of the important purposes of the legislation is to warn drivers that, whatever their subjective judgment might be as to their fitness to drive, they are objectively a danger to themselves and to other members of the public if they drive with a prescribed concentration of alcohol in their blood. Accordingly, persons who drink, drive at their peril as well as the peril of other road users.

Was the defendant's belief honestly held.?

46 As a question of fact, I find that it was the defendant's truly held belief that he had no detectable level of cannabis. More precisely, the prosecution have not disproved the defendant's evidence in this regard.

Was it a mistake of fact, or a mistake of law?

47 The leading case on this issue is *RTA v O'Rielly & Ors* [2009] NSWSC handed up by the prosecutor. In that case the appellant honestly and reasonably believed speed limit was 70kph not 60kph. That was found to be a mistake of law, not of fact. Whilst there are grey areas relating to the distinction between fact and law (See *Ostrowski v Palmer* (2004) 218 CLR 493) in this case, in my view, the belief was clearly one of fact. The defendant knew the law; he believed that he no longer had the presence of THC in his saliva.

Was the defendant's belief reasonably held?

48 This is a difficult question to answer, and I have wavered in my opinion. In particular, I am aware that parliament's intention is only relevant to the issue of whether the defence applies. Further, I was originally attracted to the contention that a mistaken honest belief about an action (driving) may never be reasonable if it originated in a crime (smoking cannabis).

49 Mr Huxtable stated that to have a detectable level of THC the defendant, absent spiking or accidental consumption, must have knowingly committed the offences of possession of a prohibited drug, and self-administration of a prohibited drug. He stated that those who flout the law cannot then rely on a reasonable mistake.

50 Mr Huxtable further stated that alcohol is regulated, legal and it is easy to assess the quantity consumed in almost all cases due to the standardisation of drinks and percentage labelling. It is impossible to assess the quantity or quality of cannabis in an illegal market.

51 These are each valid points. However, consideration of the hypotheticals canvassed during submissions, in the authorities, and discussed below, as well as application of the onus of proof, has led me to the conclusion that prosecution have not negatived reasonable mistake.

Lack of Precedent

52 I have been unable to locate a single authority on this issue – whether a belief can be reasonable where the initiating action was a separate preliminary criminal act committed many days before. The only relevant cases deal with the legality of the same act at the same time. In the joint judgment of Gleeson CJ, Gummow, Crennan and Kiefel JJ in *CTM v The Queen* [2008] HCA 25 at[8]

> Where it is a ground of exculpation, the law in Australia requires that the honest and reasonable, but mistaken, belief be in a state of affairs such that, if the belief were correct, the conduct of the accused would be innocent. In that context, the word "innocent" means not guilty of a criminal offence. In the case of an offence, or a series of offences, defined by statute, it means that, if the belief were true, the conduct of the accused would be "outside the operation of the enactment".

53 In my view, 'the enactment' refers to the substantive offence in issue, and does not require the court to peer back looking to another enactment. Similarly, the cases of *Giachin v Sandon* [2013] ACTSC 77 (9 May 2013), and *R v Duong* [2015] QCA 170 (18 September 2015) apply *Bone* interstate, but do not assist where a person is otherwise innocent but the initiating act is unlawful. See also Fullagar J at 14 in *Bergin v Stack* [1953] HCA 53.

54 In my view the focus ought not be on the original action – the smoking of the cannabis. The reasonableness of the belief ought to be focussed more sharply – at the time of or immediately before the action constituting *this* crime – driving with the presence of cannabis in the person's saliva. After all, the defendant is not relying on the defence for the offence of consuming the cannabis, only on the driving offence.

55 Apart from timing, the issue is also partly dependent upon the nature of the originating offence. In this case it is the possession and personal use of cannabis. This crime is so minor, that the police have a unique statutory discretion to deal with it by the cannabis cautioning scheme and such an offence would rarely attract more than a minor fine. For a first offence it may well not lead to a conviction.

56 The criminal law does not as a rule require 'clean hands' from those who seek to rely on defences. For example, even a person who throws the first punch can in some circumstances rely on self-defence. Self-defence is also not closed off from a trespasser or a thief. A person who engages in an armed robbery to recover goods they believe to have been wrongfully detained may have a "claim of right" that leads to acquittal.

Hypotheticals.

57 Firstly, what if the cannabis was ingested lawfully, in Colorado or Portugal or elsewhere? It cannot be that the defence is not available in the present case, but available in those circumstances. This illustrates that the focus needs to be on the mistake with respect to the act which is said to constitute this offence (driving with presence) not any other offence prior (cannabis self-administration or possession).

58 Secondly, what if a 17 year old used fake identification to enter licenced premises and then drank a spiked soft-drink. The defence of honest and reasonable mistake would still be open to her despite the unlawful entry into the club sometime prior which has a direct causative link. Again, this illustrates that the focus needs to be on the legality of the act which is said to constitute the offence (driving) not any other offence (obtaining benefit by deception).

59 Thirdly, what if a person was driving a stolen car (plea of guilty) and was also driving unlicensed (plea of not guilty – honest and reasonable mistake of fact). The defence would still be available on the unlicensed offence, even though the vehicle was stolen. Again, the focus is on the licence issue, not on the theft.

60 Fourth, what if the technology improves even more, so that the THC can be detected after one month, or three, or even twelve? Mr Bolt chose the example of two years which I scoffed at. However, on reflection the question is valid. Surely at some point the defendant's belief may be reasonable that there would no longer be the presence of THC in the saliva?

61 Fifth, a relevant hypothetical was raised in the case of *Giachin v Sandon* [2013] ACTSC 77 which applied *Bone* in that jurisdiction. Penfold J at [70] commented

> "A person who correctly believes that he or she has not consumed alcohol for a week but whose blood contains alcohol at the end of that week because of some previously undiagnosed metabolic disorder might well be able to make out a Proudman v Dayman defence".

62 The court is clearly envisaging that the defence is available where a drink-driver believes that the alcohol would have exited his system, but is mistaken, so long as the period of time is beyond anything that the person would ordinarily and reasonably expect. That broadly corresponds to the current situation.

63 In my view, each of the above hypotheticals suggest that despite the illegality of the use in this case, provided the defendant honestly believed that the cannabis was no longer present, and the passing of time was sufficient, then the prosecution may not have disproved the 'reasonable' defence. The time can only be sufficient where it is completely outside the period of any affect. Nine days is well outside that period.

Lack of Information regarding testing levels

64 I did not allow the defence to tender a document from a member of parliament seeking to support the contention that the government/police force was not releasing information on the level of the tests. The reason for that rejection is that this was effectively conceded by

the prosecution. Mr Huxtable and Mr Costin-Neilson both made the submission that should this defence succeed those who choose to use cannabis will not have to 'run the gauntlet' whereby they do not know if they are detectable. That gauntlet is apparently part of the mystery and uncertainty-by-design of the current testing regime. As expressed, the argument is that the floodgates may be opened and lessen the deterrent effect of this legislation on consumption of cannabis should the defence be applied.

65 As for floodgates, my duty is to apply the law as I see it in a given case and not determine that application based upon what could happen in other cases.

Police Advice

66 The only further prosecution submission not dealt with above is the reasonableness of reliance on the police advice. The prosecution contend that it is not reasonable. The defence contend that it is reasonable, given the dearth of information as to how long the wait has to be before the presence cannot be detected.

67 Given the evidence in this case and the context in which the advice was proffered, I am not satisfied that the reliance upon it was unreasonable. In *Ostrowski v Palmer (*2004) 218 CLR 493, the reliance on the advice given by the government agency was not found unreasonable and the situation here is similar. After all, how else is a person to determine when they are 'right to drive'? Mr Bolt suggested that government information is unhelpful - the NSW government website that I think he is referring to is the Centre for Road Safety part of Transport For New South Wales[2] where there is the surprisingly definitive, oft-quoted statement made: (my emphasis)

> "Cannabis can be detected in saliva for *up to* 12 hours after use. Stimulants (speed, ice and pills) can be detected for one to two days"

68 Mr Bolt's reference to 'unhelpful' is aptly restrained.

[2] roadsafety.transport.nsw.gov.au/stayingsafe/alcoholdrugs/drugdriving/

Conclusion

69 In my view there is no bar to raising the defence in the current circumstances. Given the length of time given following the ingestion of the cannabis, the elimination of passive ingestion as a source, and in addition the advice proffered by the police officer on the previous occasion, I am satisfied that the belief was honest and reasonable. More precisely, the prosecution have not negatived the defence.

70 Accordingly, I find the defendant not guilty in respect to the June offence, and will proceed to sentence on the May offence on a date to be fixed.

Magistrate David Heilpern

Chambers

Lismore

1 February 2016

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LOCAL COURT
New South Wales
Lismore

Jurisdiction:	Criminal
Parties:	Police v Sheree Jane McKenzie
Hearing dates:	16 June 2017
Date of Decision:	22 August 2017
Magistrate:	Magistrate David Heilpern
Representation:	Ms Batterson for the Prosecution
	Mr Bolt for the Defendant

Reasons for Decision

Introduction

1 Ms McKenzie has suffered from recurring cancer for many years, until she began consuming cannabis. Since consuming cannabis her cancer has not returned. She is a 'true believer' that cannabis is responsible for this turn-around. Ms Mckenzie is an articulate educated woman employed as a national sales manager for a media organisation on the Gold Coast. She has informed herself on medical marijuana via medical symposiums she attends and internet sites. She consumes cannabis occasionally by smoking, but mostly by rubbing a concoction she makes onto her skin every few days. The concoction is made up of coconut oil and cannabis.

2 On the weekend of 29 April 2016 the defendant attended the Mardi Grass festival in Nimbin. She drove her Kombi in the Kombi Convoy, stayed at Nimbin and then drove back toward Lismore. She was apprehended at Goolmangar for a random drug test.

3 As a result of this, the defendant was charged with the offence of driving with an illicit drug present in her blood (s111 *Road Transport Act 2013*) on 15 November 2015. She pleads not guilty on the basis of an 'honest and reasonable mistake of fact'.

4 The legislative provision is simple:

> S111 A person must not, while there is present in the person's oral fluid, blood or urine any prescribed illicit drug:
>
> (a) drive a motor vehicle…..

5 The elements of the offence are not in issue – the defendant was driving a motor vehicle on a public street whilst there was present a detectable level of cannabis and MDMA in her oral fluid.

6 It is important to note that there need not be any affect proven – the mere presence of a minute or residual detectable level of this drug is sufficient. There is a separate offence of driving under the influence of a drug for which affect must be proven.

Does the defence apply to s111 of the Road Transport Act?

7 I have previously found that the defence of honest and reasonable defence applies to s111 of the Road Transport Act – *NSW v Carrall* [2016] NSWLC 4. I adopt the same reasoning here.

Burden and onus of proof

8 There is an evidential burden to raise the defence. This has been achieved by the defendant's evidence detailed below. The prosecution then bear the burden of disproving 'honest and reasonable mistake of fact'. The test is stated clearly in the concluding remarks of Goldring J in *Appeal of Francesco Mendilicchiu* NSWDC 182 (27 August 2008) at [20]

> I find that, once the appellant raised the defence of an honest and reasonable belief by asserting facts that, if true, would have exonerated him from guilt of the offence, the evidentiary burden of disproving that defence shifted to the prosecution.

9 The prosecution must prove the defendant's guilt and she is not bound to establish her innocence. It is sufficient for her to raise a doubt about her guilt and this may be done, if the offence is not one of absolute liability, by raising the question of 'honest and reasonable mistake of fact'. If the prosecution at the end of the case has failed to dispel the doubt, then the accused must be acquitted.

Factual Scenario

10 Upon apprehension on 1 May 2016 the defendant was subject to a roadside drug test which was positive to THC. Prior to the test she was asked

> Have you taken any illicit drugs in the past few days?

11 She replied 'no'. She was arrested and given the second test which also proved positive to THC. She was asked

Do you take illicit drugs?

12 She answered

The last marijuana I had was 10 days ago.

13 This was the same information she provided to Senior Constable Jorgensen.

14 The result that came back from the third test was positive to THC and MDMA, leading to the current charge.

The Evidence of Dr Judith Perl

15 Dr Perl provided a written experts report which was tendered. In that report at paragraph 6 she stated that

> …using the methods of detection and confirmation employed in NSW, a person using cannabis 10 days prior to the test would NOT[1] have a positive result. However the Accused did have a positive result and the scientific studies demonstrate this is not possible unless cannabis had been used within about 12 hours of the oral fluid sampling

16 Under cross-examination, Dr Perl:

- Agreed that the level of MDMA was low, just above the cut off level for analysis
- Confirmed that in her opinion that generally after 12 hours you would not get a positive reading, and 24 hours is just to be on the safe side
- Stated that all CBD products available contain some THC, and that one could use these products without getting any psychoactive affect
- Opined that the reading in this case of .08 (80 nanograms per mil) is a significant level in terms of oral fluid and does indicate very recent use:

[1] The capitalisation is Dr Perl's

> At that sort of level, I would say there would be no doubt in my mind that the usage was within that 12 hours (at 12:19)

- Agreed that at the level of MDMA detected there may be no psychoactive affect.

The Evidence of the Defendant

17 The defendant knew that there was going to be drug driving testing on the roads into the Mardi Grass festival. She was certain that she had last smoked cannabis ten days earlier, and could time this due to a training regime for an overseas trek. She used the cannabis lotion on her skin in the days prior to leaving for the festival, on the Thursday night or Friday morning prior to leaving for the festival.

18 Her evidence is clear that she believed the cannabis she had used ten days prior would not be at detectable limits. She approached the testing station with utter confidence that she would be in the clear, and that she would have no cannabis in her saliva whatsoever given that time frame.

19 As to the lotion, she had previously ingested it, and this gave her a psychoactive affect. So she ceased this some years prior, and instead only applied it topically. She did not believe that this could have led to any THC being in her system, because it did not give her any psychoactive affect that way, and her research and attendance at seminars had also led her to that that conclusion.

20 She did not at any time consume any MDMA that weekend and had not done so for many years. She was not, to her knowledge around any people who were consuming MDMA. She has absolutely no idea how the MDMA came to be in her saliva.

21 Under cross-examination, the defendant was adamant that she had not consumed any MDMA or cannabis on the weekend, and that she believed that the lotion did not put any THC into her system beyond her skin. She believed that the CBD was absorbed and that it kept the cancer at bay.

22 The prosecution case was firmly and fairly put to the defendant by the prosecution:

> Q: Ms Mckenzie, it's the prosecution's case that I have to put forward to you and that would be that at some point within the period of arriving at Nimbin that after 4.20 Saturday afternoon, to the period on Sunday when you were stopped by police that you did actually consume cannabis and MDMA, is that correct?
>
> A: I did not.

23 The following exchange occurred at the end of her evidence:

> Q: By putting it on your skin, is it your belief that the CBD gets to where it's needed to assist in medical cancer, but he THC does not?
>
> A: That's correct.

Professor Weatherby's evidence

24 Prof Weatherby provided a written experts report which was tendered. On the issue of the MDMA, Prof Weatherby states:

> The amount detected is a small amount and the explanation of accidental contamination is consistent with the concentration found.

25 In response to the report of Dr Perl, Prof Weatherby is scathing of her evidence on the issue of recent use:

> These comments are not proven scientific facts. There is insufficient research at this time to substantiate these statements….Dr Perl's statements are assumptions that have not been fully scientifically tested….oral fluid or saliva is not the most reliable matrix (body fluid) to use and the reason that only the presence[2] is determined is that at this stage of knowledge it is not possible to do any more and so to state that it therefore means 'recent use' as Dr Perl has stated is wrong.

26 As to the studies relied upon by Dr Perl to form her conclusions on recent use, Prof Weatherby points to the total number of participants as being 44. He says that this is not enough to form any scientific conclusions and that much more research needs to be done:

> Therefore, the comments about use of a drug being interpreted from a single oral fluid sample is totally mistaken on Dr Perl's behalf….therefore the opinions of

[2] The underlining is Prof Weatherby's

> Dr Perl do not have merit as there is no science currently that can support conclusively what she is saying.

27 Prof Weatherby concludes that the version given by the defendant as to her cannabis use (by smoking or oil), and the findings are plausible, as is the risk of accidental or incidental MDMA contact for the MDMA.

28 In examination in chief, Prof Weatherby describes the THC reading by the defendant as low, and comments that some of the tests before and after were thousands of times higher. Further, he was even more critical of Dr Perl's conclusions about recent use at 35:15:

> She can't logically say that. It's not true.

29 Under cross-examination Prof Weatherby confirmed his view at 42:45 that the THC could have been detected ten days afterwards.

Prosecution Submissions

30 The prosecution is correct that the defendant, at one point, answered ambiguously regarding the last time she ingested the cannabis oil that she made. However, having carefully read all of her evidence, it is clear that she ceased that practice well before any relevant time in this case as it had a psychoactive affect that she wanted to avoid when using it on a daily basis.

31 I agree with the prosecution submissions that the defendant had the opportunity to use cannabis and MDMA on the weekend at Mardi Grass.

32 The prosecution submits that the court would accept the evidence of Ms Perl that the usage would have been within the 12 hour period.

Defence Submissions

33 Mr Bolt submits that the court would accept the defendant as an honest witness, that she made frank concessions about her previous drug use, and that she reasonably believed that she would be clear of all THC due to her consumption 10 days before

the testing. Mr Bolt further submits that the defendants belief that the lotion would not permit THC to enter her bloodstream was reasonable given that she had researched it fully and had a strong basis for this belief.

34 Mr Bolt points to the defendant's confidence that she would not test positive to the test, thus her repeated driving through without fear. Of course this alone is never a defence – there are many people who believe that they are 'right to drive' and are not. Miscalculation is not generally a reasonable belief, and will not suffice to cross the evidentiary burden. However, in this case, the Mr Bolt contends that the defendant, after ten days, was both honest and reasonable.

35 Mr Bolt submits that the court would accept the evidence of Prof Weatherby over that of Dr Perl.

36 I am cognisant that I have not considered Prof Weatherby's opinion or the defence submissions as to the reliability of the validity of the testing regime, and the presumptions from the certificate of analysis. It is not necessary to do so in this case given the findings below.

Expert Evidence Issues

37 This is a case where the experts have given totally contradictory evidence. Both were genuine and have considerable expertise. These differing views rest largely on agreed material – the limited published studies on the issue.

38 The leading case on this issue is *Velevski v The Queen* [2002] HCA 4. In that case three children and their mother died from knife wounds. The father of the children was charged with all four murders. The defence case was that the prosecution had not excluded the hypothesis that the mother had killed the children and then herself. Accordingly, the focus was on the expert evidence relating to the wound on the mother and whether it was self-inflicted. Two experts gave evidence that it was probable that the mother had died at her own hand. Four experts were of the contrary view.

39 The court found that this direction by the trial judge was not in error (at 36):

> "the trial judge told the jury that, in assessing the expert evidence, it was proper for them to bear in mind that they lacked the scientific knowledge and experience of the experts and that insofar as their opinion depended on scientific medical or psychological knowledge (as opposed to common experience or common sense) it would not be proper to find an issue against the accused by accepting one body of expert evidence and rejecting another unless there was good reason for doing so"

40 At 85 Gaudron J (dissenting) quoting in part from *Chamberlain v The Queen [no.2]* [1984] HCA 7 found:

> "If the conflicting evidence of experts is not based on matters or assumptions with respect to matters upon which the jury can reach its own conclusions but, instead, is evidence of "opinion on matters of science within disciplines of which each is a master, and at a level of difficulty and sophistication above that at which a juror….might by reasoning from general scientific knowledge subject the opinions to wholly effective critical evaluation", a jury cannot, by reference solely to that evidence, resolve that conflict in a manner which would eliminate reasonable doubt".

41 Gummow and Callinan JJ at 178 - 182 appear to have taken a different view where they found that:

> "the position that…..juries are entitled to prefer one group of experts over another is, as a matter of general principle, clearly established….the correct position is, in our opinion, that conflicting expert evidence will always call for careful evaluation…Juries are frequently called upon to resolve conflicts between experts. They have done so from the inception of jury trials….Nor is it the law, that simply because there is a conflict in respect of difficult and sophisticated expert evidence, even with respect to an important, indeed critical matter, its resolution should for that reason alone be regarded by an appellate court as having been beyond the capacity of the jury to resolve".

42 The task of the fact-finder in cases where there is such a dispute is succinctly characterised by the Criminal Trials Bench Book produced by the Judicial Commission of New South Wales, under the heading "Where there is a conflict between the experts…":

> "In the present case, there is a conflict between the expert evidence of [AB] called on behalf of the Crown, and that of [CD] called on behalf of the accused. It goes to the issue of….It is not a case of simply choosing between their evidence as a matter of simple preference. How you approach the resolution of that conflict

> will depend largely upon which party has the onus of proof in relation to the issue upon which the expert evidence relates…It is for you to decide whose evidence and whose opinion you accept in whole or in part, or whose evidence you reject altogether…."

43 My task is to evaluate the evidence and, keeping in mind the onus and burden of proof, assess the acceptability of the evidence.

44 In applying the above direction from the Bench Book I have carefully considered the evidence given by each of the experts. I found the evidence of Dr Perl regarding assumptions of time from consumption to detection less convincing than that of Prof Weatherby. The establishment of rigorous testing regimes using scientifically sufficient population numbers to achieve confident results is Prof Weatherby's particular expertise, and if he states categorically that the testing is insufficient to draw conclusions regarding timing, then that must be given considerable weight. His claim that ten days is plausible similarly must be considered.

45 In the end this is a criminal case where the onus is on the prosecution. The prosecution to succeed in this case would have to have seriously dented the evidence of Professor Weatherby, and they have not done so. Alternately, they would have needed to provide grounds for accepting the evidence of Dr Perl over that of Professor Weatherby. They have not done so. They bear the burden. The doubt is reasonable, and therefore must favour the defendant.

Factual Determination

46 I have no hesitation in finding that the defendant was telling the truth in her evidence as to the honesty of her belief. She was cogent and was untroubled in cross-examination. I accept as a question of fact that she did not knowingly consume any THC or MDMA on the weekend, which is the prosecution case theory. She was open and honest regarding her prior drug use, and was surprised at the test results at the time of apprehension, and remains surprised today regarding the detection of both drugs.

47 It is not for the defence to explain convincingly how or where the drugs came to be in her saliva. She has convinced the court that she did believe - honestly, reasonably and mistakenly - that she had no illicit substance in her blood when she was apprehended. That is more than enough. If there be a mystery as to how that came to be then that is a conundrum for the prosecution.

48 I find as a question of fact that the defendant did not know that she had any illicit substance in her saliva and that this belief was honest and reasonable

Conclusion

49 Accordingly, the defence having raised the defence of honest and reasonable mistake, and the prosecution having failed to negative that defence, the charge is dismissed.

Magistrate David Heilpern

Chambers

Lismore

21 August 2017

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LOCAL COURT
New South Wales
Lismore

Jurisdiction:	Criminal
Parties:	Police v Nicole Louise SPACKMAN
Hearing dates:	9 August 2018, 7 December 2018, 7 March 2019
Date of Decision:	9 April 2019
Magistrate:	Magistrate David Heilpern
Representation:	Ms Batterson (Police Prosecutor) for the Prosecution
	Mr Bolt for the Defendant

Reasons for Decision

1 The defendant has been apprehended for the offence of driving with an illicit drug present in her blood (s111 *Road Transport Act 2013*) and pleads not guilty on the basis of an honest and reasonable mistake of fact.

2 The legislative provision is simple:

> S111 A person must not, while there is present in the person's oral fluid, blood or urine any prescribed illicit drug:
>
> (a) drive a motor vehicle…..

3 The elements of the offence are not in issue – the defendant was driving a motor vehicle on a public street on 17 January 2018 whilst there was present a detectable level of THC in her oral fluid. There is no controversy with these elements in relation to the charge.

4 It is common ground that the detection level is 5 ng/ml, the cut-off for prosecution is 10, A nanogram is one thousand-millionth of a gram.

5 It is important to note that there need not be any affect proven – the mere minute or residual presence of THC is sufficient. There is a separate offence of driving under the influence of a drug for which affect must be proven. The prosecution is not suggesting that the defendant was in any way affected whilst driving.

Does the defence apply to s111 of the Road Transport Act?

6 I have previously found that the defence of honest and reasonable defence applies to s111 of the Road Transport Act – *NSW v Carrall* [2016] NSWLC 4. I note that decision has not been appealed, and I adopt the same reasoning here. So much was accepted by the prosecution in this case. I note further that the District Court in *Margaret Jane Steadman v R* (Unreported 6 December 2018) per Wells DCJ accepted that the defence was available in relation to this offence, without dissent from the Crown.

Burden and onus of proof

7 There is an evidential burden to raise the defence. This has been achieved by the defendant's evidence detailed below. The prosecution then bear the burden of disproving 'honest and reasonable mistake of fact' beyond a reasonable doubt. The test is stated clearly in the concluding remarks of Goldring J in *Appeal of Francesco Mendilicchiu* NSWDC 182 (27 August 2008) at [20]

> I find that, once the appellant raised the defence of an honest and reasonable belief by asserting facts that, if true, would have exonerated him from guilt of the offence, the evidentiary burden of disproving that defence shifted to the prosecution.

Defence Case

8 The defendant gave evidence that the last time she had consumed cannabis was on 1 January 2018. She wanted to keep her driver's licence, and knew of the risks of driving after intake of cannabis so had given up on that date as a new year's resolution. Since that time, however, on a daily basis, she had spent time with a neighbour, Wayne Fuller, who was terminally ill and a participant in the Medicinal Cannabis Compassionate Use Scheme. He smoked cannabis all day every day in the caravan which was his abode. The day before she was tested she spent time with him from half an hour to an hour. This was approximately 14 hours before being apprehended driving.

9 She was surprised she had tested positive, as she had left it 16 days since her last deliberate consumption, and had believed that she would be clear of detectable levels. Her surprise is supported by the evidence of Constable Hudson. She did not believe that she could test positive from passive smoking. This was based on a conversation with another named police officer in October 2017, who had told her that she could not get a positive reading from passive smoking. That police officer was not called to contradict the evidence of the defendant.

10 When asked in cross-examination whether she had made any enquiries herself about passive smoking, she said that she had looked up the NSW government website, and it

did not say anything about passive smoking. She did recall that the website referred to a 12 hour window.

11 It was put to the defendant that she tested positive because she had consumed cannabis shortly before being tested. This was denied by the defendant.

12 The defendant's evidence was corroborated by her partner Mr Wassan. He stated that she had not smoked cannabis since New Year's Day, and that she had been a daily visitor to the terminally ill neighbour who smoked cannabis constantly.

13 It is abundantly clear that by this evidence the defence of honest and reasonable mistake of fact is raised, and that the burden then shifts to the prosecution.

Evidence in Reply

14 Dr Perl gave the evidence in reply by way of expert report and oral evidence. Dr Perl is the Clinical Forensic Pharmacologist from the NSW Police Service Impaired Driving Research Unit, has been engaged in research on this topic since 1979, employed in this role since 1984, has been widely published in Australian and international medical and scientific journals, and is a presenter at international conferences.

15 It is important to note that, unlike in many cases I have heard involving this issue, there was no expert evidence to contradict that of Dr Perl. This raises a difficult issue for this court. I have heard scores of cases involving comparing the evidence of Dr Perl and that of other experts. Thus, I have previously accepted, in reported and unreported decisions, that THC can stay in your system for many days if not weeks at detectable oral fluid levels. I have also found in previous cases to the requisite level that cannabis can be absorbed passively and by balm or cream and can thus be detectable in oral fluid. Other experts called by the defence have raised doubt about the certainty of the conclusions of Dr Perl. I note that Wells DCJ made similar comments as follows at 3.3:

> The official bulletin from the Road Safety Transport people issued in relation to suggesting that cannabis can typically be detected in oral fluid for up to 12 hours is potentially, based simply on the evidence I have heard and other matters from

experts rather misleading. Some have said that it can be detected for a number of days at least.

16 Further, I hear dozens of these matters a month by way of plea of guilty. Many defendants submit on sentence that they have absorbed the THC detected in their oral fluid by balm or cream.

17 Clearly, this issue does not come within the ambit of s144 of the Evidence Act, in that it is not 'common knowledge' and in any event the prosecution (and defence) have not submitted on the issue.

18 On the other hand, ought the defence be required to call expert evidence in every single case of honest and reasonable mistake to counter the prosecution case that THC cannot have been in their oral fluid by the time frame or manner which it was described by the defendant?

19 I have reached the conclusion that I cannot take into account any findings on factual expert matters I have dealt with in the past, and nor can I take into account the factual (and arguably obiter) findings in the District Court. I must and do put out of my mind that I have previously found that there is considerable doubt that cannabis can only be detected for 12 or 24 hours, and ignore the findings and sentencing I have made or undertaken in relation to passive smoking and balm or cream in other cases. Judgments, including this one, can only be determined on the basis of the evidence before the court.

20 At paragraph nine of her report, Dr Perl concludes that the positive confirmation in the oral fluid of the defendant would not be possible if cannabis had been used about 17 days prior. This was based on a series of studies referred to in paragraphs six to eight of her report. She concludes at paragraph ten of her report that the positive confirmation of THC in the oral fluid indicated very recent use of cannabis – within 24 hours.

21 Dr Perl further finds at paragraphs 10 to 16 that passive exposure on the day prior to driving would not have led to a positive detection for THC.

22 Dr Perl was cross-examined extensively on these studies and her conclusions. Dr Perl stuck to her guns on each issue raised. They are conveniently grouped into the following headings – the 'blood/ oral fluid transfer' issue, 'passive smoking' and 'time since voluntary consumption'.

Blood/ oral fluid Transfer

23 This issue is important as THC can be detected in blood for a more extensive period after use. Dr Perl completely rejected the contention that THC could pass from the blood to the oral fluid – stating that the only way for the oral fluid to have detectable levels was from it having been consumed through the mouth by smoking (or presumably by eating) it. She rejected the alternative proposition that THC could be absorbed through the blood and then into the oral fluid at 3.30:

> That is a theory. However, from all the studies that have been done, that hasn't been the finding. So the problem is of course that THC is incredibly fat soluble and for it to pass from the blood into the oral fluid, it would need to pass through the membranes and it's virtually impossible with a drug like cannabis. So there isn't any evidence to say that it does occur.

24 Later at 4.10 Dr Perl ruled out categorically the possibility that THC could be introduced into the oral fluid other than by residual deposition by oral consumption.

25 On this issue I asked Dr Perl some clarifying questions. Dr Perl was adamant that if cannabis was absorbed by suppository at 13.20

> It would not appear in your oral fluid.

26 On the issue of taking THC by capsule she stated at 13:25

> So, if it is ingested it will disappear out of the oral fluid very rapidly or if it is ingested in a capsule form it will not even be detected……..

27 So, the un-contradicted evidence of Dr Perl, is unequivocally that if you take THC orally by capsule or by suppository then it is not possible to have a level of THC detectable in oral fluid. That is why the detection time period is so short when it is

consumed orally. Dr Perl maintains that the only way to test positive is by recent oral use. On her evidence blood level and oral fluid level are unrelated in the sense that the former cannot transfer to the latter in any detectable way.

28 I note that this evidence has obvious implications for the efficacy of the THC drug driving regime. Whatever the *raison detre* of this legislation, the only available conclusion from government's own expert is that criminal liability depends on the mode of intake. It is inconceivable that parliament intended that those who smoked or ate a cookie could be caught, and those who 'shelved' or swallowed a capsule could not. Further, it is apparent that a person who consumed THC by capsule (for example) could have a high blood level and be adversely affected, but not have any THC in their oral fluid, whereas those who consumed by smoking or eating 24 hours earlier and were now not affected may well have detectable THC in their oral fluid.

Passive Smoking/Delay after smoking

29 The cross-examination on these issues overlapped. Essentially, the contention put was that given the small numbers of those tested, and the limited number of studies undertaken it was not possible to be so certain in concluding that the defendant's version was impossible or improbable. Dr Perl readily conceded that there had been no studies of those exposed on a daily basis to intense passive smoking, particularly when combined with a long term cannabis use that ceased 14 days prior. However, Dr Perl countered with the proposition that daily passive smoking could never lead to a positive reading even if repeated every day for weeks as there would be a zero reading at the start of every 24 our period (in the oral fluid but not perhaps in the blood as per the above) on the current evidence. That is partly because the THC cannot travel from the blood to the oral fluid. Dr Perl also conceded that the field was in its infancy. Nevertheless, her evidence was firm that based on present scientific knowledge, the defendant could not have tested positive without active recent oral consumption.

Submissions

30 The prosecution rely on the expert evidence as to impossibility or improbability. The prosecution submit that given the scientific evidence, the court can only conclude that the defendant had very recently – within 24 hours – deliberately smoked cannabis resulting in a positive oral fluid reading to THC.

31 Further, the prosecution submit that the defendant did not have a reasonably held belief regarding the passive smoking:

> In my submission, if your (sic) going to be in the company of a person who smokes cannabis daily and you are the holder of an (sic) NSW drivers licence then it is not reasonable to not make enquiries to find out what may or may not occur regarding the possibility of passive exposure to the cannabis smoke. In my submission Ms Spackman should have been more proactive in that regard.

32 The defence submit that the defendant was a believable witness who had formed an honest and reasonable view based on the government website and a conversation with a police officer that she would not have any THC in her oral fluid, and that her evidence on a lack of recent deliberate active use was corroborated. They submit that the state of the scientific evidence is shallow, that Dr Perl's conclusions on impossibility were on cross-examination reduced to unlikelihood, and that the current knowledge is 'limited, laboratory-based and young'.

Consideration

33 I have carefully considered the evidence of the defendant and I accept her as a witness of truth. In particular, I accept that she had an honest belief that she was not driving with THC in her system, and that she had not actively smoked cannabis within the last 24 hours or at any time since new year's day. Further, I accept that she had been informed by a police officer that passive smoking could not lead to a positive test, and she had independently researched that issue and had not come up with any alternative material. It is important to note that in submissions and in cross-examination the prosecution case was clearly put – the defendant was not being truthful and had recently actively smoked cannabis. I am not satisfied beyond reasonable doubt that this is the case. The defendant was unshaken in cross-examination, and was open and straightforward in admitting her past foibles.

34 As to the evidence of Dr Perl I have some sympathy for the conundrum of the prosecution. It is difficult to prove that the defendant is lying solely on the basis of an expert's report that says that on current scientific knowledge her version is impossible or at least highly unlikely. It is notoriously difficult to prove a negative. I have read each of the journal articles Dr Perl relied on as handed up by the defence. The numbers are indeed small, and the ability to come to safe absolute conclusions is limited by that, and the ethical considerations. Dr Perl conceded as much. I am sure that for many years experts were able to honestly give evidence that (on evidence existing at that time) smoking tobacco does not cause cancer. Scientists do not know everything about THC and its rate and method of absorption. It may be that the defendant's reading is somewhat of a mystery. Nevertheless, she was, in my view, a witness of truth.

35 In my view, the defendant had formed a view as to her clean status honestly and reasonably. She is entitled to rely on the government website and information provided by a police officer. The defendant struck me as a plain-speaking and relatively un-educated person doing her best to tell the truth in court and to the police. The defendant came across as a no-nonsense compassionate and honest woman. She did not contradict herself, was not inconsistent, and gave clear, compelling and cogent evidence. Clearly, she is a person of extraordinary community commitment in terms of providing company to a dying man, and her honesty was not, in my view, effectively called into question.

36 The prosecution have not satisfied me beyond a reasonable doubt that the defendant is lying, or that she smoked in the 24 hours prior, or that she was other than honestly and reasonably mistaken as to whether she could possibly be detected with THC in her oral fluid. The scientific evidence certainly gives pause for thought as to the veracity of her evidence, but the state of the research is not such as to be able to counter the defence raised. The prosecution have not excluded the defence as a reasonable hypothesis.

Conclusion

37 Accordingly, the prosecution has failed to disprove the defence beyond a reasonable doubt and I find the defendant not guilty of the charged offence. The charge is dismissed.

Magistrate David Heilpern

Chambers

Lismore

9 April 2019